

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

ROBERT N.,

Claimant,

vs.

REGIONAL CENTER OF ORANGE  
COUNTY,

Service Agency.

OAH No. 2011040894

**DECISION**

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 16, 2011, October 24, 25, and 26, 2011, and January 13, 20, 24, 25, and 27, 2012, in Santa Ana.

Claimant was represented by his father (Father).<sup>1</sup> Claimant appeared briefly on the first day of the hearing but was not present during testimony. He was not present on any other days of the hearing.

Paula Noden, Manager, represented Regional Center of Orange County (Service Agency or RCOC) on the first day of hearing. Thereafter, Christine Petteruto, Attorney at Law, represented the Service Agency.

The documentary and testimonial evidence described below was received. The record was held open to allow the parties to submit written closing briefs, by regular mail, with proof of service by February 17, 2012, with the record to close upon OAH's receipt of the closing briefs. OAH received the Service Agency's brief on February 21, 2012, which was marked as Exhibit L. OAH received claimant's brief on February 21, 2012, which was marked as Exhibit 46. The record was closed and the matter was submitted for decision on February 21, 2012.

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<sup>1</sup> Claimant and his family members are identified by title to protect their privacy.

## ISSUE

Whether Claimant is eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of mental retardation or the "fifth category" (a disabling condition closely related or requiring treatment similar to mental retardation).

## EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits A-K; Claimant's exhibits 1-24, 26-44.

Testimonial (called or subpoenaed by Claimant): Terrie L. Naramor, Ph.D.; Richard J. Mullis, Psy.D.; Arlene Downing, M.D., RCOC Medical Consultant; Rachel Khorana, RCOC Intake Area Supervisor; Leslie Walker, Supervisor, Executive Office; and Claimant's father.

Testimonial (called by Service Agency): Peter Himber, M.D., RCOC Chief Medical Officer; Lori Burch, RCOC Senior Service Coordinator; and Mary K. Parpal, Ph.D., RCOC Psychologist.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. Claimant is 49 years old and was born on December 12, 1962.
2. On or about January 10, 2011, Father requested regional center services for Claimant from the Service Agency. Father completed a Consumer Intake Information form on which he indicated Claimant had a diagnosis of aphasia made by a pediatrician in 1967, and a diagnosis of mental retardation made by a psychologist in 2010. (Exh. 1, p. 73.) Based on IQ testing given in 2010, Claimant had a full-scale IQ of 72.
3. Between January and April 2011, the Service Agency completed its intake process and made a determination regarding Claimant's eligibility for services. By letter dated April 13, 2011, the Service Agency notified Claimant's parents that it determined Claimant was not eligible for regional center services because he did not have an eligible diagnosis that qualified him for services. On April 22, 2011, Father filed a fair hearing request, on Claimant's behalf, to appeal the Service Agency's determination and this hearing ensued.

### *Developmental and Educational History*

4. Claimant is 49 years old. He has lived his whole life with his parents. He is the youngest of three children. His brother and sister live in their own separate households.

5. Few records are available regarding Claimant's developmental and educational history. Father testified credibly regarding Claimant's history and background.

6. Claimant's parents reported that he was "late" in reaching early developmental milestones for standing alone, walking alone, first words, two to three word phrases, and complete sentences, and he did not crawl but scooted on his seat. (Exh. 1, pp. 74, 84.) In a baby book, the parents recorded that Claimant sat without support at eight months, crept on his seat at 11 months, pulled himself erect at 16 months, and walked alone at 16½ months. (Exh. 17.) Claimant did not speak until he was two years old, and his speech consisted of sounds, not words. By age four, he was hardly speaking. Claimant was uncoordinated in that he could not catch a ball or hit a ball with a bat. He was unsteady walking on stairs. (Testimony of Father.)

7. Claimant had regular check ups with his pediatrician. In 1967, when Claimant was five years old, the pediatrician diagnosed him with aphasia. (Testimony of Father; Exh. 1, p. 73.) During the time Claimant was a child and attending school, aphasia was defined as a communication or language disorder.<sup>2</sup> It was also, at that time, an educational category for special education services. (Testimony of Himber, Parpal.) Claimant received special education during his school years. No evidence was presented regarding the type of special education services he received, the dates he received the service, or the basis of his eligibility for special education services.

8. Claimant received speech therapy and physical therapy in 1970, when he was eight years old. (Exh. 1, p. 78.) In 1977, in the summer before entering ninth grade, Claimant took a speech therapy class for aphasia. The class is indicated on his high school transcript by the notation "SS '77 Aphasia." (Exh. G; Testimony of Father.)

9. According to Father, Claimant had difficulties learning in school. In the fifth grade, Claimant was reading at a "high second grade reader" and he did well in reading when he slowed down. In arithmetic, Claimant was working on understanding "tens" and addition/subtraction facts from one to 20. In spelling, Claimant was learning basic first grade words. Claimant could recognize cursive letters but had difficulty writing them. Claimant's parents offered to have Claimant held back in grade school and in high school, to give him

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<sup>2</sup> Today the term "aphasia" refers to an acquired communication disorder that impairs a person's ability to process language. "Aphasia is a disorder that results from damage to portions of the brain that are responsible for language. . . . Aphasia usually occurs suddenly, often as the result of a stroke or head injury, but it may also develop slowly, as in the case of a brain tumor, an infection, or dementia." (Exh. 20; also Exh. 18, 19.)

time to improve his academic skills. The schools advised against it. Claimant was advanced from grade to grade despite his poor academic performance.

10. Claimant attended Fullerton High School for four years and graduated on June 11, 1981. The spaces on Claimant's high school transcript for indicating his "rank in class" and "G.P.A." are blank. Claimant's transcript shows he received grades of A and B in some classes, while Claimant received ungraded credit in other classes. Father's testimony established that some of Claimant's grades were given so Claimant would have a reason to feel good about himself.

11. After high school, Claimant attended Cypress College for three years, from 1981 to 1984. He did not earn a degree. His college transcript indicates some of his courses were taken through the Learning Disabled Program. During his three years at Cypress College, the only academic courses he took were "College Arithmetic" and "Reading and Writing." Claimant took each of those classes two times. The other classes listed on Claimant's college transcript are tennis, volleyball, and introductory courses for guitar, photography, piano, and music listening.

#### *Work History*

12. Since leaving Cypress College in 1984, Claimant has spent his time looking for work. Claimant's work history consists of unskilled part-time or day jobs for minimum wage and no benefits. According to Father, Claimant has been fired from most jobs due to unsatisfactory work performance. (Testimony of Father; Exh. D, pp. 10-11.)

13. In 1986 or 1987, Claimant completed a course in printing from the North Orange County Regional Occupational Program. Afterwards, he got a job assisting with operating printing machines. He was terminated due to poor job performance. In 1988, Father arranged for Claimant to work as an unpaid volunteer at a bible printing company, in order for Claimant to gain work experience. Claimant lasted only a few weeks on the job before he was let go. Father spoke with the supervisor, who explained that Claimant did not know or understand that he should stop the machine when the print job is bad, resulting in unusable printed pages. (Testimony of Father.)

14. The longest job Claimant has held was with Yamaha Music Corporation, where he worked for 10 years from 1996 to 2006. Claimant found this job through a temporary agency. Claimant collected and bundled trash, operated the shrink wrap machine, and did packaging work. According to Father, Claimant was terminated in 2006 after he "made a mistake" and his supervisor decided he could no longer use him. (Testimony of Father.)

15. Claimant has had only two jobs that ended for reasons other than his inability to perform the job as expected by the employer. In 2007, Claimant was hired by Mervyn's department store as a part-time employee for unloading trucks. He reported to work only when Mervyn's called and had trucks to unload. This employment ended in 2008 when

Mervyn's closed its stores due to bankruptcy. In 2010, Claimant was hired by Dollar Tree to work during the holiday season. This job ended at the end of the 2010 holiday season. (Testimony of Father.)

16. Claimant is presently unemployed. He has applied for work in different settings but to no avail. Father assisted Claimant in applying for Social Security disability benefits on the basis that Claimant is "mentally impaired." (Exh. 1, p. 45.) In late 2010, Claimant was approved for Social Security disability of \$886 per month. Claimant acts as his own payee.

#### *Current Adaptive Functioning*

17. Claimant is ambulatory. He can complete his grooming, hygiene and bathing tasks independently. He dresses himself and coordinates his clothing. He can prepare simple food items using the oven, stove or microwave. He maintains his bedroom and helps with household chores. Claimant has a driver's license, which he obtained in high school, and he drives independently. However, he has had multiple accidents and received speeding tickets. He can be left at home during the day or overnight.

18. Claimant is impaired in receptive and expressive language. According to Father, Claimant is "off base" when expressing his understanding of what he reads or what he hears people say; he makes comments that are off topic. He has difficulty understanding communication from others and expressing his own ideas.

19. Claimant cannot read or write proficiently. A sample of his writing shows that his writing is underdeveloped and impaired. (Exh. 23, pp. 2-6, 9.) For example, he forgets punctuation, uses random capitalization, and has grammar and spelling errors. Claimant also has difficulty with simple arithmetic.

20. Father testified that Claimant has a checking account and a credit card. Although Claimant writes only one or two checks per month, he is unable to balance his check book each month without assistance from his parents. The Social Assessment report, prepared by the Service Agency on January 13, 2010, states that Claimant is "responsible for paying his credit card bills, health needs, and car insurance." (Exh. D, p. 6.) Father testified that Claimant is unable to read and understand his mail; he cannot differentiate between bills he has to pay and "junk mail." Claimant's car insurance and health insurance have been canceled for non-payment of premium due to Claimant not understanding he has to make a payment when he receives a bill from an insurance company. Father has contacted the insurance companies to reinstate Claimant's policies as Claimant does not know how to handle the cancelation of his insurance.

21. The Social Assessment report states that, while Claimant worked at Yamaha, he "banked" all of his earnings and "was able to purchase his car, a Toyota." (Exh. 1, p. 86; Exh. D, p. 6.) Father disagrees with this description of the transaction to the extent it suggests Claimant had to live within a budget, save his money, and independently purchase

the car. Claimant's parents do not charge him for food and rent. Father assisted Claimant in purchasing a car from Hertz rent-a-car. Father and Claimant selected a car and were allowed to rent it for three days, with the option to purchase it at the end of three days by paying the purchase price in full. They decided to purchase the car. However, Claimant was unable to complete the transaction with his bank and Father had to intervene to complete the transaction.

22. Father believes Claimant has no capacity for independent living. Claimant has had many car accidents with five different cars. He is unable to arrange for towing of his vehicle, obtain information from the other driver, fill out accident reports, or make reports to his insurance company. Father has explained to Claimant what to do if he gets into an accident or gets a flat tire or the car battery goes dead. Claimant still calls his parents to tell him what to do in those situations. Although his parents arranged for road-side assistance for Claimant through the Auto Club, Claimant was unable to use those services as he called the wrong telephone number. When Claimant worked at Yamaha, he could not complete the 1040EZ income tax form on his own. Claimant's family makes all his appointments. When one of Claimant's temporary agencies calls him for a job interview, the parents listen on another phone line and write down the information, as Claimant often writes down the wrong information. Although his parents give him detailed directions, Claimant often gets lost when driving to job interviews and calls his parents for assistance.

23. Claimant's parents are concerned about their son's future, especially when they are no longer able to care for him. He relies on his parents to make decisions for him. The parents feel he is unable to make judgments and has no ability for self-reliance, planning his future, independent living, or economic self-sufficiency.

24. Since 2010, Claimant has had weekly counseling sessions (50 minutes per session) with Richard J. Mullis, Psy.D. Dr. Mullis works with Claimant on social and occupational skills. Based on his sessions with Claimant, Dr. Mullis has found that Claimant has difficulty understanding communication from others and expressing his own ideas. He repeats or "parrots" information he has been told but does not show "meaningful comprehension." He lacks the ability to learn from his experience and mistakes. He lacks understanding of meaningful ways to achieve personal, occupational, and social goals within cultural norms. He is fine with rigid routines but any deviation from the routine is a challenge; he has difficulty adapting to new situations and becomes anxious.

*Testimony of Dr. Naramor*

25. Terrie L. Naramor, Ph.D., is a licensed psychologist. She received her doctorate in psychology from Fuller Theological Seminary in 2005. She is licensed as a psychologist in California and Texas. (Exh. 24.) Dr. Naramor testified at the hearing.

26. Dr. Naramor completed a neuropsychological evaluation of Claimant on July 20 and 21, 2010. Claimant was age 47 at the time of the evaluation. The purpose of the evaluation was to assess Claimant's current level of cognitive, behavioral, and

social/emotional functioning, and to assist him with vocational planning. Dr. Naramor prepared a written report of her findings and conclusions. (Exh. E, pp. 3-6.) She also discussed some of her findings, and provided a copy of the written report, to the Social Security Administration in a letter dated November 9, 2010, in connection with Claimant's application for Social Security disability benefits. (Exh. E, pp. 1-6.)<sup>3</sup>

27. (A) Dr. Naramor spent a total of 10 hours evaluating Claimant. She conducted clinical interviews with Claimant and his parents. She administered tests which are listed in her written report, including but not limited to the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III), the Wechsler Memory Scale - Third Edition (WMS-III).

(B) Dr. Naramor also administered Claimant tests that were "non-standard, out-of-age-range" (meaning that the tests were normed for children or adolescents). These tests are identified in her written report by an asterisk and include the Wechsler Individual Achievement Test-Third Edition (WIAT-III), the Test of Auditory Processing - Third Edition (TAPS-3), the Behavioral Assessment System for Children, Self Report Form - Adolescent (BASC-SRA), the Behavior Rating Inventory of Executive Functioning - Self Report (BRIEF-SR), and the Brown Attention Scales - Adolescent. At hearing, Dr. Naramor testified that she used the out-of-age-range tests to get qualitative, descriptive information about Claimant, e.g., how he views himself, how he identifies stressors, his personality traits, and the like. She did not use these out-of-age range tests to evaluate and diagnose Claimant for mental retardation.

28. (A) Dr. Naramor administered the WAIS-III to measure Claimant's cognitive ability. Claimant's verbal IQ was 71 (borderline) and his performance IQ was 78 (borderline). Those two IQ scores were combined to derive a full-scale IQ of 72 (borderline), which represents Claimant's overall level of intelligence. (Exh. E, pp. 4, 7.)

(B) The WAIS-III has four index scores: verbal comprehension and perceptual organization both involve reasoning; working memory measures how the brain processes information; and processing speed measures the speed that the brain can perform routine tasks that do not require reasoning or problem solving. Claimant's index score in verbal comprehension was 74 (borderline), perceptual organization was 72 (borderline), working memory was 65 (impaired), and processing speed was 86 (low average). (Exh. E, pp. 4, 7.)

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<sup>3</sup> In the letter, Dr. Naramor states it is appropriate for Claimant to be identified as "developmentally disabled," given that his adaptive functioning and intellectual abilities are impaired. (Exh. E, p. 1.) This statement, by itself, does not establish that Claimant has a "developmental disability" under the Lanterman Act. Dr. Naramor wrote this letter in connection with Claimant's application for Social Security disability benefits. (Exh. 1, p. 45.) The eligibility requirements for Social Security are different from the eligibility requirements for Lanterman Act services. For example, the Lanterman Act requires a disability originating before age 18, whereas Social Security requires a disability originating before age 22. (See, Legal Conclusion 3; Exh. 39.)

(C) Dr. Naramor opined that Claimant's full-scale IQ of 72 is within the range of mental retardation, based on the measurement error recognized under the DSM-IV-TR. The DSM-IV states: "It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." (DSM-IV-TR, pp. 41-42 [Exh. 13].)

29. The WMS-III is a primary measure of learning and memory. On the WMS-III, Claimant's scores were in the average or low average range, except for one index score (visual delay) that was in the borderline range. (Exh. E, p. 10.) Dr. Naramor found that the WMS-III scores "reflected variable abilities." Claimant tends to forget visually encoded information over time, but is better able to accurately identify or recognize verbally presented information after a delay. She opined that Claimant's brain continues to work on auditory information following its presentation. In her opinion, the ability to recall verbal information "is an area of strength commonly found in developmentally disabled individuals." She noted, however, that Claimant's ability to recall verbal information does not mean he is able to comprehend what he recalls, given that "his reasoning and comprehension of verbal information was in the impaired range (1st percentile)" and he "performed poorly on tasks that required problem-solving or abstract thinking." (Exh. E, pp. 1, 5, 10.)

30. (A) Dr. Naramor scored the WIAT-III by using computer software for the WIAT-Second Edition (WIAT-II). At hearing, Dr. Naramor testified that WIAT-III was published in 2009 and she purchased it in 2010. Previously, Dr. Naramor had used the WIAT-II for 10 years. The WIAT-II is normed for adults up to age 89. Dr. Naramor assumed that WIAT-III would likewise be normed for adults. She was wrong. When she attempted to score the WIAT-III for Claimant, she received an error message that the test was out of age range. Dr. Naramor compared the WIAT-II and WIAT-III and identified the subtests that were the same for both tests. On those subtests only, she used the WIAT-II software to generate Claimant's scores on the WIAT-III. Dr. Naramor testified this was an "unusual way" to score the test, but it was a "work-around on an unexpected situation" and "you do the best you can at the time."

(B) On the WIAT-III, Dr. Naramor generated composite scores for Claimant for Reading and Math. Claimant's composite score for Reading was 52 (less than the first percentile). (Exh. E, p. 8.) On the Reading subtests, Claimant's word reading was less than the first percentile, reading comprehension was at the first percentile, and pseudo word decoding was in second percentile. Claimant's composite score for Math was 63 (first percentile), with subtest scores for numerical operations in the third percentile (borderline) and 0.1 percentile (impaired) for math reasoning. From the WIAT-III composite and subtest scores, Dr. Naramor concluded that Claimant's academic achievement is generally below his intellectual functioning, with his reading, math and spelling abilities in the impaired range. (Exh. E., p. 4.)



31. Dr. Naramor administered the Test of Everyday Attention (TEA). Claimant's overall performance on the TEA reflected variable abilities ranging from average to impaired. His scores indicated his visual attention was generally better developed than his auditory attention. He has substantial difficulty maintaining adequate attention on auditory tasks that are particularly long and boring. Claimant performed better on auditory tasks that were short and structured. On tasks involving multi-tasking or with time constraints, Claimant tended to make errors and perform poorly. Claimant was unable to comprehend instructions for the most complex tasks. (Exh. E, pp. 4, 9.)

32. Dr. Naramor administered the Beery/Buktenica Developmental Test of Visual-Motor Integration (VMI) and the Motor-Free Visual Perception Test - Third Edition (MFVPT). Dr. Naramor found that Claimant's visual-spatial and motor skills "reflect slightly variable development." He performed in the impaired range on most tasks that required visual processing and tasks that required visual-motor integration (eye-to-hand coordination). He scored in the borderline impaired range on a task of motor coordination. (Exh. E, pp. 5, 11, 12.)

33. Dr. Naramor measured Claimant's ability to process auditory information with the TAPS-3. The scores provided were relative to a person of age 21; Claimant's age of 47 would yield even lower scores than those obtained during this testing. Claimant performed in the low average range on a word discrimination task, which Dr. Naramor found to be an indication that he can distinguish between similar sounding words with relatively good accuracy. He "tended to sustain adequate attention for the listening task." Claimant scored in the impaired range in phonological segmentation and the borderline impaired range in phonological blending. He scored in the impaired range on the subtests for auditory comprehension and auditory reasoning. (Exh. E, pp. 5, 13.)

34. Dr. Naramor assessed Claimant's executive functioning and his perception of his own executive functioning and coping style. She administered the BRIEF-SR, Brown Attention Scales, and BASC-SRA, which were non-standard, out-of-age range. In executive functioning, Claimant performed in the average and low average range on tasks of visual scanning and motor speed, but he struggled with tasks that required problem-solving and abstract thinking. (Exh. E, p. 5.) Claimant assessed his own executive functioning. In general, Claimant reported he had difficulty shifting from one cognitive task to another, and has challenges with emotional control, monitoring, and working memory. He views himself as exhibiting good inhibition and having strong organizational abilities. In assessing his coping style, Claimant tended to view himself as having adequate resources for coping with stressors, but indicated that he struggles with a sense of inadequacy and symptoms of depression. Dr. Naramor found that Claimant's views of himself and his abilities suggests that he does not fully grasp his weaknesses and inabilities. His lack of awareness may leave him vulnerable to other individuals and certain situations. (Exh. E, pp. 5-6.)

35. (A) Dr. Naramor's opinion is that Claimant has significant deficits in adaptive behavior in the areas of communication, self-care, home living, use of community resources, self-direction, functional academic skills, work and leisure. In her November 9, 2010, letter

to Social Security, Dr. Naramor wrote: "[C]laimant's adaptive abilities are impaired. He is unable to maintain an independent household, maintain employment without supervision, or manage a budget. [Claimant] also has tremendous difficulty in maintaining social relationships. . . . In my opinion, [Claimant] is unable to understand and carry out instructions that are anything but the simplest. [Claimant] requires supervision in a work setting in order to ensure that he is following instructions but also to ensure that he is not being taken unfair advantage of by coworkers or others with whom he may come into contact. [Claimant's] challenges make it unlikely that he can cope with pressure in a work setting. This is evidenced by his work history." (Exh. E, pp. 1-2.)

(B) Dr. Naramor did not administer any test of adaptive functioning, such as the Vineland Adaptive Behavior Scales. She testified that a test of adaptive functioning is typically an interview format where the clinician questions a person with knowledge of the individual whose adaptive functioning is being evaluated, or has the person rate the subject individual's functioning pursuant to a checklist. Adaptive testing provides a structure for a person to comment on or rate another person's level of adaptive functioning. During her evaluation of Claimant, Dr. Naramor gathered information about his adaptive functioning primarily through her interviews with Claimant and his parents and through her observations during testing. Measures of adaptive functioning were also embedded within some of the tests she administered to Claimant. For example, adaptive deficits in communication are reflected in Claimant's verbal IQ score. In addition, Claimant's response booklet for the WIAT-III shows that how Claimant writes and expresses himself is "extremely underdeveloped," in that he forgets punctuation, uses random capitalization, and makes grammar errors. (Exh. 23, pp. 1-6.) Dr. Naramor testified that since her interactions with Claimant covered areas in the adaptive function rating scales, she felt she did not need to administer a specific adaptive function test to make a diagnosis of mental retardation for Claimant.

36. At the hearing, Dr. Naramor opined that Claimant has had mental retardation since birth because there is no other explanation, and no evidence of accident or illness, that would cause him to have the level of cognitive difficulty that he has. During the clinical interviews, Dr. Naramor learned that Claimant has always had trouble learning in school, his work history is checkered, and he has difficulty maintaining himself at age-appropriate levels. However, Dr. Naramor did not review any records regarding Claimant's cognitive functioning prior to age 18, and her written report does not discuss Claimant's functioning prior to age 18.

37. Based on her evaluation, Dr. Naramor's opinion is that Claimant meets the DSM-IV diagnostic criteria for mild mental retardation, given his intellectual abilities and his level of adaptive functioning. She recommended that Claimant should be evaluated for community based assistance and Social Security disability, and he should regularly meet with a counselor or therapist who can assist him with social skills training. (Exh. E, p. 6.)

### *Testimony of Dr. Parpal*

38. Mary K. Parpal, Ph.D., is a licensed psychologist and one of the Service Agency's clinical staff who reviewed Claimant's case and made a recommendation regarding his eligibility.<sup>4</sup> She received her doctorate in psychology from Stanford University in 1986. She has been employed by the Service Agency as a psychologist for 13 years. Her main duty is to review cases for eligibility determinations under the Lanterman Act. (Exh. K; Testimony of Parpal.)

39. Based on her review of the available records, Dr. Parpal concluded that Claimant is not eligible for regional center services because he "does not have a diagnosis of mental retardation" and "does not have a condition like mental retardation." (Exh. C, p. 3.) The Service Agency's position, as stated in its closing brief, is that Dr. Naramor's diagnosis of mild mental retardation is not a valid diagnosis. Dr. Parpal testified at the hearing regarding her review of records and her opinion that Claimant is not eligible for services.

40. Dr. Parpal has never met Claimant or administered any testing to him. The DSM-IV-TR states that individualized testing is always required to make the diagnosis of mental retardation. (DSM-IV-TR, p. 46 [Exh. 13].) Dr. Parpal did not do any testing because she already had the results of recent testing by Dr. Naramor. Further, Dr. Parpal felt there was sufficient available information and records on which she could make her determination.

41. Dr. Parpal reviewed Claimant's high school transcript. (Exh. G.) She noted that Claimant graduated with his class after four years of high school. Dr. Parpal testified that, based on her experience with RCOC's consumers, students with mental retardation typically do not graduate from high school in four years but stay in school until age 21 or 22 in a transition program. Dr. Parpal concluded that the classes graded as "CR" were special education classes, and the classes with letter grades were regular education classes. In her experience reviewing hundreds of high school transcripts, letter grades are not given in special education classes. Claimant's transcript shows grades of A and B in some classes. Dr. Parpal concluded that Claimant passed his classes and achieved the grades shown on the transcript. In Dr. Parpal's experience, a student with mental retardation would not be expected to receive "A" and "B" grades in regular education classes. Dr. Parpal interpreted the notation "SS '77 Aphasia" to indicate that Claimant received special education services on the basis of aphasia.

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<sup>4</sup> Dr. Arlene Downing and registered nurse Shirley Brinson are the other members of the Service Agency's clinical staff who reviewed Claimant's case for eligibility. Dr. Peter Himber reviewed Claimant's case as part of the Service Agency's preparation for this hearing. Drs. Downing and Himber and nurse Brinson each concluded Claimant was not eligible. As the Service Agency's psychologist, Dr. Parpal's recommendation and testimony was the most pertinent on the issue of eligibility based on mental retardation and the fifth category.

42. Dr. Parpal reviewed the Parent Conference Form from Claimant's fifth year of grade school. (Exh. H.) On cross-examination, Dr. Parpal testified that some of the comments could be indicative that Claimant has mental retardation, but they are not determinative. Dr. Parpal found the comment that Claimant's reading improved when he slowed down was not typical for children with mental retardation. She agreed the comment about his arithmetic skills, given Claimant's age indicates a mild delay in arithmetic and could be consistent with mental retardation but not necessarily so. She found that Claimant spelling at the first grade level, when he was in fifth grade, indicated a delay in his ability to sequence and spell, which could be consistent with mental retardation but could also be indicative of a processing problem or learning disability.

43. Dr. Parpal reviewed the Cypress College transcript. She noted the transcript indicates claimant took courses through the Learning Disabled Program. Learning disabilities are excluded as an eligible condition for regional center services. Dr. Parpal testified that students with mental retardation do not attend Cypress College and take classes with assistance as students with learning disabilities. Students must prove they have a learning disability (through documentation or assessment) to take classes through the Learning Disabled Program.

44. Dr. Parpal concluded that Claimant presents with some adaptive deficits but they are not so significant as to reach a diagnosis of mild mental retardation. Dr. Parpal reviewed the Social Assessment report. (Exh. D.) Among other things, she noted that Claimant shows no substantial disability in self-care and activities of daily living. He got his driver's license in high school and drives independently. In Dr. Parpal's experience, RCOC's consumers with mental retardation typically do not have driver's licenses. He can go to the store to make purchases. He is responsible for paying his credit card bills and car insurance. He held a job and saved money to buy his own car. He has significant work history at Yamaha, where he worked for 10 years without a job coach. Dr. Parpal's conclusion is weakened, however, by Father's testimony regarding Claimant's difficulty paying his bills and the circumstances of the purchase of his car, as established in Findings 20 and 21, above.

45. Dr. Parpal's opinion is that Claimant does not have a valid diagnosis of mental retardation. Dr. Naramor's diagnosis is based on IQ testing when Claimant was 47 years old and, as such, is of little value in establishing his cognitive IQ prior to age 18. Dr. Naramor did not review any records of Claimant's cognitive functioning prior to age 18. Further, Dr. Parpal opined the diagnosis is not valid because Dr. Naramor did not conduct any testing of adaptive functioning; she did not discuss Claimant's adaptive functioning in her written report.

46. Dr. Parpal's opinion is that the full-scale IQ of 72 alone does not meet the criteria for mental retardation if there is scatter in the subtests. Claimant had scatter in his subtest scores ranging from 65 to 86. (Exh. E, p. 7.) Dr. Parpal testified that scale scatter is indicative of a learning disability.

47. Dr. Parpal questioned Dr. Naramor's use of the WAIS-III to measure Claimant's IQ. The WAIS-III relies on verbal instruction and responses and would not be the best assessment tool, in Dr. Parpal's opinion, for a person with a "documented speech and language disorder." Dr. Parpal opined that the WMS-III is a better measure of Claimant's cognitive functioning, as the WMS-III is the tool used by school districts that are banned from administering a Wechsler IQ test to certain pupils. Claimant's scores on the WMS-III were all in the average range, except for one score, which was in the borderline range. Dr. Parpal testified that Claimant's WMS-III scores were not indicative of mental retardation. Typically, RCOC's consumers with mental retardation have global deficits; they do not have abilities in the average range.

48. Dr. Parpal's critique of Dr. Naramor's testing methods is not persuasive. Wechsler IQ tests, such as the WAIS-III, are widely accepted and referenced in the DSM-IV-TR. Dr. Parpal did not personally administer any test to Claimant; her testimony is insufficient to establish that Claimant had any difficulty completing the WAIS-III. The few records presented in this case cannot be said to establish a "documented speech and language disorder." Dr. Parpal's critique that Dr. Naramor used out-of-age-range tests does not invalidate the diagnosis of mental retardation. Dr. Naramor testified credibly that she used the out-of-age range tests to gather qualitative information about her patient, and did not rely on such tests in making the diagnosis of mental retardation.

49. Based on her review of records, Dr. Parpal concluded that Claimant does not have a qualifying diagnosis under the "fifth category" category of Lanterman Act eligibility, a condition similar to mental retardation or that requires treatment similar to mental retardation. He does not present with adaptive deficits consistent with mental retardation or similar to mental retardation.

#### *DSM-IV-TR*

50. The Diagnostic and Statistical Manual of Mental Disorders (4<sup>th</sup> edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR) is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. The manual uses a number system for the different disorders which is accepted by most medical and psychotherapeutic professionals (and insurance companies) as a shorthand method to designate the disorders that are more specifically described in the manual.

51. The DSM-IV-TR describes mental retardation as follows:

The essential feature of Mental Retardation is significantly sub average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18

years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

*General intellectual functioning* is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly sub average intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

(DSM-IV-TR at pp. 39 - 42 [Exh. 13].)

52. Regarding mild mental retardation (IQ level of 50-55 to approximately 70), the DSM-IV-TR states:

[Persons with mild Mental Retardation] typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. By

their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings. (*Id.* at pp. 42 - 43 [Exh. 13].)

## LEGAL CONCLUSIONS

1. Claimant has established that he suffers from a developmental disability entitling him to regional center services. (Factual Findings 1-52.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Regional center's decision. Where a claimant seeks to establish eligibility for services, the burden is on the appealing claimant to demonstrate that the Regional center's decision is incorrect. Claimant has met his burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a) defines "developmental disability" as:

a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, learning disabilities and/or disorders solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) If a person's condition is *solely* caused by one or more of these three "handicapping conditions," he or she is not entitled to eligibility. "Solely learning disabilities" is defined as "a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss." (*Ibid.*)

5. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability." California Code of Regulations, title 17, section 54001 states, in pertinent part:

“Substantial disability” means:

(a) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(b) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

6. In California Code of Regulations, title 17, section 54002, the term "cognitive" is defined as "the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience."

7. In addition to proving a “substantial disability,” a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as “Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512.) This category is not further defined by statute or regulation.

8. Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior. Under the Lanterman Act, a regional center does not have a duty to serve all of them.

9. While the Legislature has not defined the fifth category, it does require that the qualifying condition be “closely related” (Welf. & Inst. Code, § 4512, subd. (a)) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be “closely related” or “similar” to mental retardation, there must be a manifestation of cognitive or adaptive deficits, or both, which render that individual’s



disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on IQ scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with mental retardation. Furthermore, determining whether a claimant's condition "requires treatment similar to that required for mentally retarded individuals" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone's condition requires such treatment.

### *Discussion*

10. Claimant has not met his burden of proving eligibility on the basis of mental retardation. It was not established, by a preponderance of the evidence, that Claimant has a diagnosis of mental retardation under the DSM-IV-TR criteria. Dr. Naramor made the diagnosis using IQ testing administered when Claimant was 47 years old. She did not review any records of Claimant's cognitive functioning prior to age 18. The DSM-IV-TR criteria for mental retardation requires the individual to have sub average intellectual functioning (shown by an IQ of 70 or below) prior to age 18. The record in this case is insufficient to establish Claimant's IQ prior to age 18. Dr. Naramor's diagnosis is weakened by the fact she did not conduct any adaptive function testing.

11. Claimant's eligibility must next be analyzed under the fifth category. Claimant's full-scale IQ score of 72 on the WAIS-III places him in the range of mental retardation. It is important to note that IQ is a statistical concept, derived by psychological testing. Mental retardation has been defined as two standard deviations below the mean, (the lower two to three percentile ranges of the population). With an average or mean IQ score being 100 and with a standard deviation being 15, an IQ score of 70 falls within the mentally retarded range, as long as the other criteria are met. But, as set forth in the DSM-IV TR, there is no such thing as an absolute IQ score. The "margin of error" can be as much as five points, up or down. Thus, based on Finding 28(A), Claimant's full-scale IQ could be anywhere from 67 to 77. This is exactly the type of score range that, given Claimant's adaptive deficits (discussed below), would place him in the fifth category.

12. As noted above, IQ alone does not determine whether an individual is mentally retarded. One must also look at the individual's adaptive functioning. As set forth in California Code of Regulations, title 17, section 54001, subdivision (b), because an individual's cognitive and/or social functioning are many-faceted, there are at least seven categories relative to adaptive functioning that must be examined. These categories are the same or similar to the categories of adaptive functioning skills listed in the DSM-IV-TR that, to support a diagnosis of mental retardation, requires a finding of significant limitations in at

least two such skills. Applying the evidence to the seven listed categories reveals the following:

- (1) Receptive and expressive language: Claimant is impaired in his ability to comprehend verbal communication from others, and in expressing himself, both verbally and in writing. (Findings 18, 19, 24, 35.)
- (2) Learning: Claimant is impaired in his ability to learn. (Findings 9-11, 18-24, 28-31, 35, 36.)
- (3) Self-care: Claimant is able to independently perform daily, self-care activities (e.g., grooming, bathing, hygiene, brushing teeth, and dressing).
- (4) Mobility: Claimant is not impaired in his mobility.
- (5) Self-direction: Claimant has no self direction, and cannot plan, organize or accomplish tasks without direction, prompting and supervision. (Findings 18-24, 35, 36.)
- (6) Capacity for independent living: Claimant cannot live independently, nor is he likely ever to be able to live independently. (Findings 12-16, 18-24, 35, 36.)
- (7) Economic self-sufficiency: Claimant's work history consists of unskilled, minimum wage jobs that are part-time and without benefits. He does not have a work history indicative of economic self-sufficiency. (Findings 12-16, 18-24, 35, 36.)

13. Based on all of the evidence as set forth above, it is determined that Claimant suffers from a condition that is similar to mental retardation.

14. The nature and extent of Claimant's deficits in cognitive and adaptive functioning support a finding that his condition has existed his whole life. Claimant did not just wake up one day with these deficits. The credible testimony of Father regarding Claimant's background, Dr. Naramor's opinion, and the DSM-IV-TR's recognition that cognitive IQ is a "stable attribute," supports this conclusion.

15. Based upon the evidence presented, Claimant has met his burden of proof that he has a substantial disability as defined by Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54001. He has a disabling condition that is similar to mental retardation.

16. The law is clear as to the weight to be given the testimony of the two expert witnesses in this matter. The testimony of Dr. Naramor, who spent two counseling sessions with Claimant, is given greater weight than the testimony of Dr. Parpal, who conducted a record-review only. The Court in *People v. Bassett* (1968) 69 Cal.2d 122, had occasion to do

a detailed analysis of the use of expert testimony when the issue is one of mental competence. The Court stated, commencing at page 141:

Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. They differ widely in origin, in characteristics, and in their effects on a person's mental processes, his abilities, and his behavior. . . . Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed and affected the mental and emotional processes . . . it does not lie in his mere expression of conclusion . . . both [doctors who testified for the State] conceded on the stand that they had never talked with this defendant, and the record does not disclose they had ever seen him . . . [A] distinguished federal court recently surveyed the medical writings on this subject, and concluded, "The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject . . ." [The doctors for the state] left no doubt on cross-examination that their regular practice was to conduct personal examinations and that they would have preferred to do so in this case.

The Court in *Bassett* gave little weight to the testimony of the experts who had not examined the defendant therein, but merely conducted a record review. The Court did give substantial weight to the evidence presented by the defendant's experts who thoroughly examined, tested and interviewed the defendant. For these reasons, Dr. Parpal's expert testimony is given less weight than that of Dr. Naramor.

17. Dr. Parpal reached her conclusions based solely on her review of records. Since she did not personally meet Claimant or his parents, Dr. Parpal obtained much of Claimant's background information from the Social Assessment report (Exh. D). That report, however, was not accurate or complete in some respects about describing Claimant. For example, the report states that Claimant graduated with a "regular" high school diploma. The high school transcript, however, does not show a final G.P.A. or rank in class. The Social Assessment report states that, when Claimant worked at Yamaha, he "banked" all of his earnings and was able to purchase his own car. Finding 21 established the purchase of the car did not involve Claimant budgeting and saving money over time to make the purchase. The Social Assessment report states that Claimant was terminated from Yamaha because the company was not willing to work with Claimant's temporary agency. Finding 14 established he was fired due to job performance. The Social Assessment report also states that Claimant is responsible for paying his credit card bills and insurance, but does not state that he needs assistance from his parents because he does not understand his mail and does not recognize bills he has to pay, as established in Finding 20. It is the material from which expert opinion is fashioned and the reasoning of the expert in reaching his or her conclusion that is

important. (*In re marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.) "[T]he weight to be given to the opinion of an expert depends on the reasons he [or she] assigns to support that opinion.' [Citation]; [sic] its value ' ' rests upon the material from which his [or her] opinion is fashioned and the reasoning by which he [or she] progresses from his [or her] material to his [or her] conclusion . . . ' ' [Citation.] Such an opinion is no better than the reasons given for it [citation], . . . " (*White v. State of California* (1971) 21 Cal.App.3d 738, 759-760; see also *Richard v. Scott* (1978) 79 Cal.App.3d 57, 63-64.)

18. Based upon the evidence presented, Claimant has met his burden of proof that he has a substantial disability as defined by Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, section 54001. He has a disabling condition that is similar to mental retardation. Claimant is eligible to receive Regional Center services under the fifth category.

#### ORDER

RCOC's determination that Claimant is not eligible for regional center services is overruled, and Claimant's appeal of that determination is granted. RCOC shall accept Claimant as a client forthwith.

DATED: May \_\_\_, 2012

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ERLINDA G. SHRENGER  
Administrative Law Judge  
Office of Administrative Hearings

#### NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.